

Supreme Court of the United States

OCTOBER TERM, 1945

No. 732

HOMER C. ZINK, Comptroller of the Treasury of
New Jersey, et al.,

*Petitioner and
Respondent-Appellee below.*

vs.

CITY OF JERSEY CITY, a municipal corporation
of New Jersey, et al.,

*Respondents and
Relators-Appellants below.*

Petition for Writ of Certiorari to the New Jersey Court of
Errors and Appeals, and Brief in Support Thereof.

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January 12, 1946.

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Petition for Writ of Certiorari to the New Jersey Court of
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*To the Honorable HARLAN F. STONE, Chief Justice of the
United States, and the Associate Justices of the
Supreme Court of the United States:*

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This cause involves but one issue—Did the New Jersey Court of Errors and Appeals violate the principles of a republican form of government when it undertook to assume power beyond that confided to it by the constitution

and laws of New Jersey in the instant case and did the unconstitutional acts of the said Court make its judgment subject to review and reversal under Article IV, section 4, of the United States Constitution? This question has never been decided.

There have been many cases stating that questions arising under the said Article IV, section 4, were political in nature and for Congress to determine. But in all of those cases the question was whether there had been a denial of a republican form of government. In none of those cases was a question similar to that contained in the instant inquiry where the present review is asked in support of an existing republican form of government. In none of those cases was there shown the need for the rule which we shall urge in this case. We believe that, if we are permitted to argue this matter, we shall demonstrate that our governmental system of checks and balances lacks an essential important element unless the rule advanced by the State of New Jersey here is found to be the law.

In the summer of 1944, certain defaulting railroad companies paid into the treasury of New Jersey a large amount of taxes and approximately \$15,276,000 in interest due by reason of the defaults. (T. pg. 3.) The State Comptroller immediately issued his warrants for payment of the amount of the taxes under authority of New Jersey Revised Statutes, sections 54:24-11 and 54:24-13. He refused to distribute the interest money because the said sections only appropriated the amount of the taxes (T. pg. 3) and it was doubtful whether there was a sufficient appropriation to satisfy Article IV, section VI, paragraph 2 of the New Jersey Constitution which provides:

“No money shall be drawn from the treasury except for appropriation made by law.”

Thereafter Chapters 4, 5 and 6 of the laws of 1945 were enacted, which sought to appropriate the interest money. A reading of the Acts shows clearly that the Legislature had proceeded on the premise that there had heretofore been no appropriation of such moneys. These acts and Chapter 34 passed later have been declared by the New Jersey Court of Errors and Appeals to be unconstitutional. With their action on this score, this petition has no quarrel. It is with powers asserted with reference to the old law that we are concerned in this application. We will proceed more expeditiously if we treat the matter as if the 1945 legislation had never existed.

The present judgment arose out of the respondent's application to the New Jersey Supreme Court for a Writ of Mandamus to compel the Comptroller to issue his warrant to the State treasurer for payment of the interest money under authority alleged to exist by reason of the said R. S. 54:24-11 and 13. The 1945 legislation was only incidentally touched upon as witness the prayer of the petition. (T. pg. 9.) The application was denied. (T. pg. 143.)

Upon dismissal of the rule by the New Jersey Supreme Court (T. pg. 143), the respondent, Jersey City, took an appeal to the New Jersey Court of Errors and Appeals. At the argument of the matter, your petitioner urged (1) Since the respondent by his action sought the determination of the question of whether there had been an adequate appropriation as required by law, this action constituted a suit against the State, which the Court was without jurisdiction to entertain, and (2) That there never had been an appropriation of the interest money and the Legislature alone was authorized to make an appropriation.

The New Jersey Court of Errors and Appeals proceeded to take jurisdiction of this suit against the State without any color of authority. In its opinion (T. pg. 153) it poses a question, the answer to which clearly requires the State to be a party. In such state of affairs, the Comptroller in

his official position was the alter ego of the State of New Jersey.

Loder vs. Baker, Arnold Co. (Sup. Ct. 1876), 39 N. J. L. 49;

Strobel Steel Construction Co. vs. State High Commission (N. J. Ct. of E. & A. 1938), 120 N. J. L. 298, 300.

The said Court proceeded thereafter to hold that an appropriation of taxes carried with it the interest collected thereon although there was no authority whatsoever to support such conclusion. By so doing the said Court has made an appropriation in violation of Article IV, section VI, paragraph 2, of the New Jersey Constitution. In both the above instances, the said Court violated Article III, section I, of the said Constitution.

The republican form of government as established in New Jersey provides in the said Article III for the distribution of the powers of government "into three distinct departments—the Legislative, the Executive, and the Judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as expressly provided." The said Court by its action in the instant case has clearly usurped the powers of the legislative branch. It has therefore interfered with the orderly working of that republican form of government which was set up under the guarantee of the Federal government as contained in Article IV, section 4, of the United States Constitution.

The State of New Jersey had no reason to anticipate that its highest Court would be guilty of such usurpation and argued below only the questions having to do with the New Jersey Constitution. As soon as the Court of Errors and Appeals had made its determination, the State immediately by a petition for re-argument, made a part of the transcript

solely to prove this point, called to the attention of the said Court our claim as to the unconstitutionality of its action. The re-argument having been denied, this petition is now being made.

The New Jersey Courts have shown no hesitancy in declaring acts of the Legislature unconstitutional. That is good, for therein do we check abuse of power by the Legislature. The said Courts have shown no hesitancy in enjoining unconstitutional acts by the Executive. And that is good, for thereby do we check our abuse of power by the Executive. We believe that upon review we will be able to show that only if the rule be adopted which we shall urge in this case can we have an effective check over unconstitutional acts on the part of the judiciary. We will urge that such unconstitutional acts do not constitute a denial of the republican form of government and so present questions for Congress to consider, but that such unconstitutional acts are an interference with the orderly working of an existing republican form of government and that such interference constitutes a justiciable controversy under the Constitution of the United States. We will urge that a guarantee of a republican form of government loses much of its effectiveness if one of the coordinate branches of that government can by its judgment commit an unconstitutional act that is not subject to review by any impartial, unbiased and disinterested umpire.

JURISDICTIONAL STATEMENT.

It is contended that this Court has jurisdiction to entertain the present petition under 28 U. S. C. A. 344 (b) in that certain rights, privileges and immunities afforded to the State of New Jersey by virtue of Article IV, section 4 of the United States Constitution have been abridged by the New Jersey Court of Errors and Appeals, which by the entry of judgment in the above cause has interfered with the orderly working of the republican form of government

which was established under the guarantee contained in the above mentioned section.

The party in interest is Homer C. Zink, Comptroller of the Treasury of New Jersey, as the alter ego of the State of New Jersey. *Strobel Steel Construction Co. vs. State Highway Commission, supra*. The petition is prosecuted for and on behalf of the said State which stands to lose upward of \$8,000,000 of its revenue by the unconstitutional action of its Court. (T. pg. 101.)

The question of the violation of the Federal Constitution was not raised until after the determination by the Court of Errors and Appeals because it could not be anticipated that the Court itself would be guilty of unconstitutional acts. We are not dealing with an error in judgment or with an abuse of discretion, matters that are voidable only if appeals are taken within the prescribed time and which would not here be reviewable because as such they would afford no federal question. We are dealing with usurpation—with a complete lack of jurisdiction in the Court below and a judgment that should be declared by this Court to be a nullity. If the action of the Court below would under any circumstance warrant review by this Court as a violation of any right incident to the protection contained in the said Article IV, section 4, then by analogy with the reasoning contained in *Ford Motor Co. vs. Indiana* (1945), 65 S. Ct. 347, the question could no doubt quite properly be raised here for the first time regardless of notice to the Court below.

In *William Cramp & Sons Ship & Engine Co. vs. International Curtis Marine Turbine Co.*, 228 U. S. 645, this Court allowed its writs to review a judgment of the Circuit Court of Appeals that was a nullity because of the disqualification of one of the judges below.

QUESTION PRESENTED.

Did the New Jersey Court of Errors and Appeals violate the principles of a republican form of government when it undertook to assume power beyond that confided to it by the constitution and laws of New Jersey in the instant case and did the unconstitutional acts of the said Court make its judgment subject to review and reversal as constituting a case in law or equity arising under Article IV, section 4, of the United States Constitution?

REASONS.

A substantial federal question has been presented which as far as we have been able to determine has never heretofore been presented. It is not urged that the New Jersey Court of Errors and Appeals has by its judgment attempted to deny to New Jersey a republican form of government, but that by its action it has refused to play its proper part in the orderly functioning of that government which was established by the people pursuant to the guarantee of the Federal Constitution as contained in Article IV, section 4.

A guarantee of a republican form of government loses much of its effectiveness if the highest Court of the guarantor is without power to assist in reviewing and reversing an unconstitutional judgment of the State's highest Court in a case where but for the intervention of the said Federal Court there is no other method of review. Impeachment of the offending judges is not an effective remedy because it goes to the punishment of men and not to the reversal of the judgment.

This country has just won its right to continue as a democracy in a conflict of shuddering proportions. But we came through because we had confidence in ourselves

and in our institutions. We have survived because we have demonstrated a virility in those institutions. And among those institutions, our system of law has shown consistent and healthy growth. We have been ever willing to accept innovations, to correct inconsistencies, and to develop a remedy where that remedy is needed.

We have in our governmental system an elaborate system of checks and balances. But within the State system there is one glaring weakness—the lack of an orderly method for review of an unconstitutional act of a State Court, committed under State law, in such a way as to strike at the offending judgment.

We urge, as a reason for the granting of the Writ, the great need for the Court to answer the question posed above in the affirmative. It would be a healthy development in our scheme of constitutional checks and balances. It is a development that could not help but build public confidence and lend prestige to our judicial system. The need being present, the Writ should go to enable the applicability of the proposed rule to the federal constitutional provision in question to be fully explored.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the New Jersey Court of Errors and Appeals, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Errors and Appeals had in the case numbered and entitled on its docket No. 14853, City of Jersey City, a municipal corporation of New Jersey, et al., Relators-Appellants vs. Homer C. Zink, Comptroller of the Treasury of New Jersey, et al., Respondents-Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Court of

Errors and Appeals be reversed by the Court, and for such other relief as to this Court may seem proper.

HOMER C. ZINK,
*Comptroller of the Treasury
of New Jersey.*

By: BENJAMIN C. VAN TINE,
Counsel for Petitioner.

WALTER D. VAN RIPER,
Attorney-General.

Dated: January 12, 1946.